No. 12092

In The United States Court of Appeals
For the Ninth Circuit

THOMAS L. OLDFIELD, *Appellant*,

vs.

SS ARTHUR P. FAIRFIELD, her engines, boilers, tackle, apparel and furniture, and American Pacific Steamship Company (a corporation), *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellees.

603 Central Building,
Seattle 4, Washington.

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

APPELLEES' STATEMENT OF THE CASE

This libel was brought by appellant, a seaman aboard the SS ARTHUR P. FAIRFIELD, to originally recover the sum of $479.20 which had been deducted from his pay by the Master of the vessel as his pro rata share of a fine levied against the vessel at Rotterdam, Holland, July 21, 1947, by Customs Officials of the Kingdom of the Netherlands in the amount of $3,018.00. The fine was imposed as the result of finding 126 cartons of undeclared cigarettes secreted about the vessel.

Just before the trial of the case, appellees obtained a partial remission of the fine assessed against the vessel, which resulted in a pro rata credit to appellant of the amount of $368.24, reducing the amount in litigation to the sum of $110.96.

At the trial of the case, appellant did not appear to testify, nor was any testimony offered in his behalf. Appellees introduced the depositions of the Master of

the vessel, Captain Corbin, Chief Mate Plikat and Purser Davis. Their testimony may be summarized briefly as follows:

Appellant joined the SS ARTHUR P. FAIRFIELD as an officers' B. R. Waiter in May of 1947 at San Francisco, California. The vessel was destined for Rotterdam, Holland, and other European ports. About two or three days out of Rotterdam, appellant approached Purser Davis and desired to purchase ten additional cartons of cigarettes. He offered to pay Davis $1.00 per carton, although the slop chest price per carton was $.75.

Appellant was the union delegate of the Stewards' Department. When the vessel reached Rotterdam on the morning of July 21, 1947, Purser Davis told appellant and other union delegates aboard the vessel that the Dutch Customs Officials would only permit one carton of cigarettes per man during the stay of the vessel in Rotterdam and that all excess cartons would have to be delivered to him and placed in the slop chest and sealed until the vessel departed from Rotterdam.

A search of the vessel later that day by Customs Officials of the Dutch Government resulted in the finding of a number of contraband cartons of cigarettes which were confiscated by the Dutch officials. Nineteen cartons were found in the officers' saloon where appellant was employed. As a result of the seizure, the Dutch Government levied a fine of $3,018.00 against the vessel, which the Master was obliged to pay to procure the release of the vessel.

After the payment of the fine, Captain Corbin thereupon addressed the ship's company and advised them that unless the identity of the individuals who were responsible for the secreting of the contraband cigarettes was disclosed to him that he would limit further shore leave. As a result, one Burke, the delegate of the Deck Department, called upon Captain Corbin with a list of names of those implicated in the attempted smuggling, which revealed that appellant had secreted nineteen cartons of the contraband cigarettes. Thereupon appellant and others involved in the matter were duly logged.

Subsequently, appellant advised Chief Mate Plikat that he was responsible for the attempted smuggling of nineteen cartons of cigarettes.

When the vessel paid off October 14, 1947, at Portland, Oregon, appellant protested the forfeiture of his wages to the Shipping Commissioner. Appellant stated he threw the cigarettes overboard before the vessel arrived at Rotterdam, but could not produce a witness to substantiate this contention.

The deck delegate, Burke, was then called before the Shipping Commissioner and in appellant's presence told the Shipping Commissioner that appellant had informed him, Burke, that he was responsible for nineteen cartons of the contraband cigarettes and for this reason his name was included on the list furnished Captain Corbin by Burke.

The Shipping Commissioner thereupon sustained the logging of appellant and wage forfeiture.

SUMMARY OF DISTRICT COURT'S OPINION

Judge Bowen's opinion (Ap. 82, 82½ and 83) denying appellant a recovery (except for his pro rata share of the remitted fine amounting to $479.20, for which appellant was given judgment) was based upon the undisputed fact that appellant had caused damage to the vessel by his illegal conduct; that both under the general Maritime Law and equitable principles the appellees were entitled to recoupment of the damage suffered by wage forfeiture. Judge Bowen was of the further opinion that the logging of appellant and the withholding of his wages for the amount of damage caused the vessel was further authorized by the provisions of Title 46 U.S.C.A., Sec. 701, Paragraphs Seven and Eight. Appropriate findings of fact and conclusions of law were entered in conformity with Judge Bowen's opinion (Ap. 18-23, inc.).

ERRONEOUS BASIS OF APPEAL

Appellant in his brief contends that the deduction of his wages could only be made under Paragraph Eight of Title 46 U.S.C.A., Sec. 701. To define the term "smuggling" employed in Paragraph Eight, *supra*, he resorts to Sec. 2865 Revised Statutes and criminal cases decided thereunder.

Sec. 2865 Revised Statutes makes criminal the completed act of smuggling articles into the United States with the intent to defraud the revenue of the United States. The statutes and authorities cited by appellant are not relevant at bar. The acts of appellant were a breach of the customs laws of the Kingdom of The Netherlands as indicated by the translation of the ap-

plicable Dutch Customs regulations, designated "Respondents' Exhibit A-1" (Ap. 30-34, incl.).

APPLICABLE STATUTE

The applicable statutes for consideration in this appeal are Title 46 U.S.C.A., Sec. 701, 702 and 705, which read as follows:

"Sec. 701. Various offenses; penalties

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay.

Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience

shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours, continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court.

Sixth. For assaulting any master, mate, pilot, engineer, or staff officer, by imprisonment for not more than two years.

Seventh. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by fortfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months.

Eighth. For any act of smuggling for which he is convicted and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage and the whole or any part of his wages may be retained in satisfaction or on account of such liability, and he shall be liable to imprisonment for a period of not more than twelve months. R.S. Sec. 4596; Dec. 21, 1898, c. 28, Sec. 19, 30 Stat. 760; Mar. 4, 1915, c. 153, Sec. 7, 38

Stat. 1166; Aug. 1, 1939, c. 409, Sec. 6, 53 Stat. 1147."

"Sec. 702. Entry of offense in log book

Upon the commission of any of the offenses enumerated in section 701 of this title an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense. R.S. Sec. 4597; Dec. 21, 1898, c. 28, Sec. 20, 30 Stat. 761."

"Sec. 705. Enforcement of forfeitures

Any question concerning the forfeiture of, or deductions from, the wages of any seaman or apprentice may be determined in any proceeding lawfully instituted with respect to such wages, notwithstanding the offense in respect of which such question arises, though made punishable by imprisonment as well as forfeiture, has not been made the subject of any criminal proceeding. R.S. Sec. 4603."

These statutes derive from the Act of June 7, 1872, c. 322, Sec. 51, 17 Stat. 273, 274 and 275.

They were obviously intended by Congress as a Marine Code to regulate internal discipline aboard merchant vessels of the United States. The determination of the occurrence of an infraction of these provisions is primarily delegated to the Master of the vessel as well as initially prescribing the punshment therefor. The Master is required by Sec. 702, *supra*, to log the offense for which he convicts the seaman, inform him of the same and the convicted seaman is given a copy of the logging.

ANSWER TO APPELLANT'S FIRST AND SECOND ASSIGNMENTS OF ERROR

To bring the retention by appellees of appellant's wages within the provisions of Paragraph Eight of Sec. 701, *supra*, three elements are necessary: (1) any act of smuggling; (2) for which the seaman is convicted; and (3) whereby loss or damage is occasioned to the vessel.

Since there is no question that the vessel was damaged by the necessity of paying the customs fine of $3,018.00 to procure its release from arrest by the Customs Officials of the Kingdom of The Netherlands, consideration of the first two elements alone are requisite.

DID APPELLANT COMMIT AN ACT OF SMUGGLING?

It is to be noted that Paragraph Eight of Sec. 701, *supra*, is very broad in scope and encompasses within its prohibition "any act of smuggling." Thus, it refers to all preliminary acts incident to a completed act of smuggling and not merely the completed act of smuggling itself.

Appellant obviously was engaged in attempting to smuggle ashore nineteen cartons of cigarettes in violation of the Dutch Customs Laws. His illegal scheme was frustrated by the discovery of the cigarettes and his illegal purpose defeated.

That the preliminary act of secreting contraband merchandise aboard a vessel in violation of the customs laws of a foreign nation is an act of smuggling for which the seaman's wages can be forfeited was decided in 1848 in the case of *Scott v. Russell*, Fed. Cas. No. 12546, 21 Fed. Cas. page 849, where, in a strikingly similar factual situation District Judge Betts held an act of smuggling had been committed:

> "BETTS, District Judge. It is sufficiently proved that the libellant clandestinely carried on board the vessel in New York a considerable quantity of tobacco, and that, immediately on the arrival of the vessel in Liverpool, a very similar quantity was found secreted under the caboose occupied by him as cook. This is, I think, sufficient evidence that he took on board the tobacco there detected, and that his misconduct caused the arrest of the vessel. If it were the fact, as suggested by counsel, that there were two distinct parcels of tobacco discovered, it would not have been difficult for the libellant to have produced evidence tend-

ing to show what disposal was made by him of the portion which it is amply proved he carried on board. In the absence of any evidence of that character, it is fair to presume that the parcels were the same; especially as the place of concealment was peculiarly accessible to the libellant.

"For a seaman wilfully to commit an act of dishonesty or fraud, which exposes the vessel to jeapardy, is a breach of the duty and fidelity which he owes to the ship. Such act amounts to barratry. (3 Durn. & E. (3 Term R.) 277; 2 Caines, 222; Wesk. Inst. tit. 'Barratry'), and may be considered in diminution or in bar of his wages (Curt. Merch. Seam. 118). The wrong may be used by the ship-owner to countervail the seaman's suit for wages, without resorting to a cross-action to that end. The libellant, if not a British subject, was shipped in a British port, and must be presumed cognizant of a law so notorious as that smuggling tobacco into Great Britain subjects the vessel to the danger of confiscation. Carrying the tobacco on board clandestinely, and keeping it closely concealed in port, imports his consciousness that the act was unlawful. His conduct must, therefore, be regarded as a gross violation of duty, attended with expense and delay to the ship, for which it is proper to impose a subtraction of wages by way of correction and amends."

WAS THERE A CONVICTION OF APPELLANT?

The evidence in this case establishes that after the imposition of the fine on the vessel, Captain Corbin made an investigation to determine the identity of those seamen guilty of illegally secreting the cartons of cigarettes. This resulted in the disclosure to the Master that appellant had secreted nineteen of the contraband cartons. Captain Corbin upon this evidence deetermined that appellant had committed an act of smuggling and convicted him of this offense and recorded this conviction in the log of the vessel, carefully following the procedure prescribed by Sec. 702, *supra*, for logging the commission of the offense.

Parenthetically, it may be observed there is no question of appellant's guilt. After the logging he admitted the same to Chief Mate Plikat (Ap. 64).

Furthermore, when paid off at Portland, Oregon, at the end of the voyage, appellant submitted the propriety of the deduction of his wages to the Shipping Commissioner. This procedure is authorized under Title 46 U.S.C.A. Sec. 651 and 652. In the presence of the Shipping Commissioner and in the presence of appellant, Burke, the seamen's delegate, advised the Shipping Commissioner that appellant had admitted his secreting the nineteen cartons of cigarettes, with which he was convicted.

A consideration of Sec. 701, *supra*, and its obvious purposes will indicate that initial determination of the commission of offense therein enumerated must be made by the Master. Since the preservation of discipline aboard a merchant vessel requires prompt puni-

tive measures be taken not only by way of punishment to the guilty seamen but as a deterrent to his shipmates, Congress, by Paragraph Eight, *supra*, gave the Master the initial authority to convict a seaman of the offenses prescribed by the statute. The determination by Captain Corbin that appellant was guilty of an act of attempted smuggling and his logging therefore under Sec. 702, *supra*, constituted a "conviction" of appellant for this offense.

As a protection against unjust, harsh or oppressive action by the Master, in the matter of deducting a seaman's wages, Sec. 702, *supra*, provides an elaborate system of logging and publicizing the offense for which the seaman is convicted.

Furthermore, an appeal from the Master's logging resulting in deduction of a seaman's wages can be taken to the United States Shipping Commissioner under Title 46, U.S.C.A. Sec. 651 and Sec. 652, such as was done by appellant. A judicial review (such as was taken here) is further authorized under Sec. 705, *supra*.

In the event that the seaman has been unjustly imprisoned aboard the vessel by the Master for violation of the provisions of Sec. 701, *supra*, he has his action for damages for such unlawful conduct.

It is submitted that the trial court was correct in ordering the forfeiture of appellant's wages under the Eighth Paragraph of Sec. 701, *supra*.

ANSWER TO APPELLANT'S THIRD AND FOURTH ASSIGNMENTS OF ERROR

The trial court also found the forfeiture of appellant's wages authorized by Paragraph Seven of Title 46 U.S.C.A. Sec. 701, *supra*, which reads as follows:

> "Seventh. For wilfully damaging the vessel, or embezzling or wilfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months."

This is merely a recent codification of the ancient admiralty rule that any seaman whose conduct causes damage to the vessel is responsible therefor. The rule is sometimes referred to as based upon equitable considerations.

This ancient right of recoupment has been recently referred to by the Second Circuit in the case of *Shilman v. United States*, 164 F.(2d) 649, which involved the right of the vessel to offset seamen's wages.

> "(2) The cases cited by the appellees in support of a set off of $200 all fall within the category of expenses incurred on behalf of the ship in connection with the voyage. Sometimes they have related to hiring a substitute for a deserting seaman or for securing his return; sometimes for making the vessel good out of a seaman's wages for medical expenses occasioned by his assault on a member of the crew; at other times they have been deductions for a smuggling of goods which subjected the vessel to jeopardy or for allowing a stowaway to be on board. *Swanson et al. v. Torrey et al.*, 4 Cir., 25 F. 2d 835; *The Ellen Little*, D.C. Mass., 246 F. 151; *The W. F. Babcock*,

2 Cir. 85 F. 978; *The T. F. Whiton*, D.C. S.D. N.Y, Fed. Cas. No. 13,849; *Snell et al. v. The Independence*, D.C. E.D. Pa., Fed. Cas. No. 13,139; *Scott v. Russell*, D.C. S.D. N.Y., Fed. Cas. No. 12,546; *Magee v. The Moss*, D.C. E.D. Pa., Fed. Cas. No. 8944."

Smuggling with consequent loss to the vessel or its owner has invariably been recognized as giving the ship-owner the right to set off damages incurred by the vessel because of the commission of such offense. The rule of *Scott v. Russell, supra*, was followed in the case of *The Horace E. Bell*, Fed. Cas. No. 6,702, 12 Fed. Cas. page 526, where the court said:

"* * * That there was smuggling is admitted, and I think that the evidence in the case sufficiently proves that the libellants were concerned in it. But the smuggling was not sufficient to forfeit the vessel, which, if it had been over $400 in value, it would have done. Laws U.S. (Stat. 1797, Sec. 5). The master alone was arrested, and he paid a fine of fifty dollars. If this suit had been against him, this would have been an equitable as well as legal defence. It is admitted, that on the part of seamen, this is a grave offence and ought not to be lightly passed over. * * *."

In the case of *Willard v. Dorr*, Fed. Cas. No. 17,680, 29 Fed. Cas. page 1277, Judge Story, writing the court's opinion, said at page 1280:

"* * * Smuggling on the part of a master is a criminal departure from duty and a rank offence, calling upon the court for its most decided reprobation. Where it is gross in its circumstances, and attended with serious damage or loss to the owner, it is such a violation of the master's contract, as may be justly visited with the penalty

of forfeiture of wages. And under the most venial and favorable circumstances, the damages actually sustained by the owner may be charged upon the wages of the master, and deducted by way of diminished compensation therefrom. * * *."

The legal basis of such offsets in the opinion of Judge Story is as follows:

"* * * The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as a restitution in value for damages sustained in consequence of gross violations of the contract for such services. * * *."

In the case of *The Ellen Little*, 246 Fed. 151, the court said:

"The alleged deduction rests, therefore, upon a right asserted under the general maritime law to deduct from the wages of an officer damages caused to the vessel by his failure to serve faithfully. See *Willard v. Dorr*, Fed. Cas. No. 17,680; *Scott v. Russell*, Fed. Cas. No. 12,546; *The T. F. Whiton*, Fed. Cas. No. 13,849; *The Marjory Brown* (D.C.) 134 Fed. 999. * * *."

In *The Coniscliff*, 266 Fed. 959, the court said:

"The claim of the answer for reimbursement is not based upon any request of libellant that he be sent to the hospital, but upon the doctrine of the general maritime law, giving a right to deduct from the wages of an officer damages caused to the vessel by his wrongful act or fail-

ure to serve faithfully. *Willard v. Dorr*, Fed. Cas. No. 17,680; *Scott v. Russell*, Fed. Cas. No. 12,546; *The T. F. Whitton*, Fed. Cas. No. 13,849; *The Marjory Brown* (D.C.) 134 Fed. 999; *The Ellen Little* (D.C.) 246 Fed. 151."

In *The T. F. Whiton*, Fed. Cas. No. 13,849, 23 Fed. Cas. page 873, the court said:

> "* * * That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has often been held. *Scott v. Russell* (Case No. 12,546); *Brown v. The Neptune* (Id. 2,022); *The Tusker* (Id. 14,274)."

Since appellant's unlawful act inflicted damage upon the vessel, both under the authority of Paragraph Seven of Sec. 701, *supra*, and the general Maritime Law applicable, the vessel owner is entitled to a forfeiture of appellants' wages to the extent he caused damage to the vessel and the lower court was correct in so decreeing.

ANSWER TO APPELLANT'S FIFTH ASSIGNMENT OF ERROR

The trial court upon being advised by appellees' counsel that the fine assessed against the vessel had been partially remitted by the Dutch Government just before the trial of the cause in the United States District Court at Seattle, Washington, on July 20, 1948, resulting in a credit to appellant of the sum of $368.24, entered a judgment in appellant's favor for his pro rata share of the remitted fine and decreed neither party were entitled to their costs.

The disallowance to appellant of his costs is claimed to be erroneous.

The allowance of costs in an admiralty case is always a matter in the discretion of the court.

> *The Maggie J. Smith*, 123 U.S. 349, 31 L. ed. 175, 8 Sup. Ct. Rep. 159;
>
> *The Sapphire*, 85 U.S. (18 Wall.) 51, 21 L. ed. 814.

Benedict on Admiralty, 1940 Edition, Volume 3, page 229, states the rule to be:

> "* * * Costs generally follow the decree, but circumstances of equity, of hardship, of oppression or of negligence induce the court to depart from that rule in a great variety of cases. Costs are sometimes from equitable considerations denied to the party who recovers his demand and are sometimes given to a libellant who fails to recover anything, when he was misled to commence the suit by the act of the other party. * * *"

In the case of *The Lily*, decided by this circuit March 16, 1934, 69 F.(2d) 898, the court said:

> "* * * Libellants contend that it was an error for the trial court to tax costs against libellants. In admiralty the matter of costs rests in the discretion of the trial court and very wide latitude has been exercised. In the absence of a clear abuse of that discretion the trial court's determination will not be disurbed on appeal. The *Maggie J. Smith*, 123 U.S. 349, 356, 8 S. Ct. 159, 31 L. ed. 175; *The Lyra* (C.C.A.) 255 F. 667; Benedict on Admiralty (5th ed.) vol. 1, p. 520."

We respectfully submit there was no abuse of discretion by the District Court in refusing to award ap-

pellant costs, since appellant's unlawful conduct caused damage and expense to the appellees, not only by the imposition of the original fine on the vessel but also in subsequent expenses incurred by appellees in procuring a substantial remission of the same, by which appellant's original liability was substantially diminished.

CONCLUSION

We submit the decree of the trial court was correct and should be affirmed. To follow appellant's theory of the applicable law would constitute an open invitation to seamen on American merchant vessels to flagrantly flaunt the customs laws of foreign nations, to subject our merchant vessels to seizure or fine at the hands of those offended sovereignties and then to permit the guilty parties to escape all financial responsibility for their illegal acts and the damage caused thereby. We cannot conceive that sound public policy will be served by such a result nor than Congress intended such a result by the enactment of Sections 701 and 702, *supra.*

Respectfully submitted,

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EDW. S. FRANKLIN,
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